Supreme Court, U.S.
FILED
99 20 41 MAY 0 9 2000
OFFICE OF THE CLERK

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

ANTHONY VALLONE, a.k.a. "Tutti,"
Petitioner, pro se,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Vallone
Reg. No. 08881-054
UPS Atlanta
Box PMB
Atlanta, GA 30315

Petitioner,
pro se

50PP

QUESTIONS PRESENTED FOR REVIEW

I. WAS PETITIONER VALLONE DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR FOR THE GOVERNMENT ENGAGED IN PERSISTENT ACTS OF OUTRAGEOUS MISCONDUCT THAT, IN THE WORDS OF THE ELEVENTH CIRCUIT, INFECTED EVERY DAY OF TRIAL "FROM THE BEGINNING OF JURY SELECTION UNTIL THE VERDICT"?

II. WAS PETITIONER VALLONE DENIED HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO SELF-REPRESENTATION WHEN THE DISTRICT COURT FORCED AN ON-THE-RECORD WAIVER DESPITE VALLONE'S PROTEST THAT HE HAD NO CHOICE BECAUSE THE COURT REFUSED TO ANSWER HIS PRE-TRIAL PRO SE MOTIONS

NOR ORDER THE GOVERNMENT TO TURN

OVER DISCOVERY MATERIAL?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b),

Petitioner advises the Court that he is the only party to the proceeding, as is evident from the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedural History 3

B. The Eleventh Circuit's Ruling 3

C. Statement of Facts 4

REASONS FOR GRANTING THE WRIT 7

The Eleventh Circuit has decided an important question of federal law with regard to prosecutorial misconduct that conflicts with the decision of the Illinois Supreme Court in People v. Blue, Ill., No 84046 (1/27/2000), as well as the dissenting opinions of members of this Court in Darden v. Wainwright, 477 U.S. 168(1977). Moreover, the Eleventh Circuit has entered a decision with regard to a defendant's right to self-representation that is in direct conflict with this Court's decision in Faretta v. California, 422 U.S. 806 (1975).

CONCLUSION 11

VERIFICATION 11

TABLE OF AUTHORITIES

Cases **Page**

Brady v. United States, 397 U.S. 742 (1970) 10

Chapman v. United States, 553 F.2d 886 (5th.Cir.1977) 11

Darden v. Wainright, 477 U.S. 168 (1977) 7,8

Dorman v. Wainright, 798 F.2d 1358 (11th.Cir.1986) 10

Faretta v. California, 422 U.S. 806 (1975) 8,9

People v. Blue, Ill., No 84046 (1/27/2000) 7

United States v. Fant, 890 F.2d 408 (11th.Cir.1989) 10

Constitution

U.S. Const. amend. V 2

U.S. Const. amend. VI 2

Statutes and Rules

18 U.S.C. § 113 3

18 U.S.C. § 1512 3

21 U.S.C. § 841 2

21 U.S.C. § 846 2

Other

Holland, John "Hairstylist Receives 51-Month Sentence," South Florida Sun-Sentinel p. 1B (12/31/99) 5

OPINIONS BELOW

Petitioner seeks review of the October 6, 1999, order of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Barkett and Markus, JJ.), Case No. 96-5256, which affirmed both conviction and sentence in a criminal case out of the Southern District of Florida. See **Appendix A**. Petitioner subsequently sought rehearing with suggestion for rehearing en banc, which was denied in an order entered January 3, 2000. See **Appendix B**. The Court thereafter granted a pro se application for extension of time, which extended the deadline for filing to and including May 12, 2000. See **Appendix C**.

JURISDICTION

This Petition has been filed with the May 12, 2000, deadline imposed by Associate Justice Anthony M. Kennedy. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, the pertinent portions of which are set forth below:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

U.S. CONST., AMEND. V.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND VI.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Anthony Vallone ("Vallone") was indicted by a grand jury in the Southern District of Florida for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 841 (a) (1) and one count of attempt to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. He was subsequently indicted for one count of attempted murder in violation of 18 U.S. C. § 1512 (a) (1) (A), and one count of assault with intent to commit murder in violation of 18 U.S. C. § 113(a).

B. The Eleventh Circuit's Ruling

On Appeal Vallone raised, inter alia, an issue of whether persistent prosecutorial misconduct violated his rights to due process, a fair trial, and an impartial jury, as well as whether he was denied the right to proceed pro se. In a unanimous opinion handed down October 6, 1999 (Tjoflat, Barkett and Marcus, JJ.), the Eleventh Circuit

rejected Vallone's claims and upheld both conviction and sentence.

C. Statement of Facts

At arraignment, Vallone stated clearly and unequivocally for the record that he wished to represent himself. In response, United States Magistrate Judge Laurana Snow expressed her opinion that "courts just love pro se defendants." She added that going pro se is the surest way to receive a maximum sentence upon conviction. Vallone continually expressed his desire to proceed pro se throughout the pretrial stages of prosecution.

Shortly before trial, the prosecutor for the Government asked the district court to order Vallone to choose on the record whether or not he would proceed pro se. When, upon motion of the prosecutor, the district court ordered Vallone to elect whether he would proceed pro se or with the assistance of court-appointed counsel,

Vallone explained that he had no choice but to proceed with court appointed counsel because the Government had not provided him with any discovery material, nor had the district court ruled on any of his pre-trial motions. The prosecutor recognized that, in light of Vallone's explanation, the waiver of his right to proceed pro se was invalid. He asked the district court to conduct a further inquiry. Vallone again explained that his waiver was, in fact, coerced for the reasons stated. The district court nevertheless ordered Vallone to proceed to trial with court-appointed counsel. On appeal, the Eleventh Circuit dismissed this issue as not "warrant[ing] further discussion."

Beginning with his highly inflammatory comments about the "mafia" made during voir dire and continuing until the verdict, the prosecutor focused the jury's attention on the mafia and extraneous events, such as gangland murders, involving organized crime figures,

many of whom had no connection to Vallone. In the Eleventh Circuit's own words,

> The prosecutor's conduct in this case violated the principles [of prosecutorial misconduct] [] [f]rom the very beginning of jury selection until the verdict in this case . . . .
>
> * * * * *
>
> Indeed, we would have to reproduce a significant portion of the transcript to delineate all the irrelevant and unduly prejudicial prosecutorial comments and evidence elicited in this case.

See Opinion pp. 8,9. Yet, notwithstanding the extent of the prosecutorial misconduct, the panel nonetheless affirmed Vallone's conviction because it found "overwhelming evidence of guilt that was properly admitted at trial." Opinion pp. 14.[1]

---

[1] Apparently unknown to the panel was the prosecutor's misconduct on appeal as well. As Vallone emphasized on both his reply brief and his petition for rehearing, the "overwhelming evidence" relied upon by the panel consisted of misstatements and misrepresentations of fact by the prosecutor.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WITH REGARD TO PROSECUTORIAL MISCONDUCT THAT CONFLICTS WITH THE DECISION OF THE ILLINOIS SUPREME COURT IN People v. Blue, Ill., No. 84046 (1/27/2000), AS WELL AS THE DISSENTING OPINIONS OF MEMBERS OF THIS COURT IN Darden v. Wainright, 477 U.S. 168 (1977). MOREOVER, THE ELEVENTH CIRCUIT HAS ENTERED A DECISION WITH REGARD TO A

Furthermore, this prosecutor is no stranger to judicial findings of misconduct. See, e.g., Holland, John "Hairstylist Receives 51-Month Sentence," South Florida Sun-Sentinel (12/31/99), where it is reported that U.S. District Judge Daniel T.K. Hurley found "deeply troubling" assistant U.S. Attorney Paul Schwartz' non-disclosure of highly exculpatory Brady material, and his discussion with FBI agents about omitting the evidence.

DEFENDANT'S RIGHT TO SELF-REPRESENTATION THAT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN Faretta v. California, 422 U.S. 806 (1975).

As shown by the opinion below, this case involves a due process issue of which members of the Court, as well as the lower courts, have repeatedly expressed grave concern: Applying the "harmless error" analysis to cases of persistent, outrageous acts of prosecutorial misconduct. See, e.g., Darden v. Wainwright, 477 U.S. 168, 173 (1986) (Blackmun, Brennan, Marshall and Stevens, dissenting) ("[i]f we continue to do nothing practical to prevent [flagrant acts of prosecutorial misconduct], we should cease to disapprove"); see also People v. Blue, Ill., No 84046 (1/27/2000) (where the Illinois Supreme court recently reversed a conviction despite what it said was overwhelming evidence of the defendant's guilt after cataloging several instances of prosecutorial misconduct

it deemed so severe as to cast doubt on the integrity of the judicial process).

It stand to reason that any case in which a reviewing court could find that reproduction of "significant portions" of the trial transcript would be necessary to delineate all the irrelevant and unduly prejudicial evidence would demand reversal.

With regard to the district court's denial of Vallone's right to self-representation, the Eleventh Circuit entered a decision in direct conflict with the Court's decision in Faretta v. California, 422 U.S. 806 (1975). In Faretta the Court held that forcing a defendant to accept against his will a government appointed public defender deprives that defendant of his constitutional right to conduct his own defense. Id. at 836.

That Vallone, in fact, waived this right is of no consequence under the circumstance. He advised the district court that he had no choice but to waive his right, because the court had not ruled on any of his pro se pre-

trial motions nor ordered the Government to turn over discovery materials. Vallone stated explicitly on the record that his waiver was coerced.

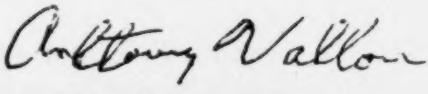
Waivers of constitutional rights must be voluntary. Brady v. United States, 397 U.S. 742, 748 (1970). The transcripts of the proceeding clearly show Vallone's waiver of his right to represent himself pro se was involuntary. It would be a weak right indeed if Vallone could so easily be forced to waive his constitutional right to self-representation by having to choose between receiving discovery and answers to his pre-trial motions with appointed counsel or being denied such vital necessities without. See cf. Dorman v. Wainright, 798 F.2d 1358, 1367 (11th.Cir.1986) ("it would be a weak right indeed if a defendant had to risk sanctions by the court to keep a constitutional right"). Moreover, this right is not subject to harmless error analysis. United States v. Fant, 890 F.2d 408, 410 (1989); Chapman v. United States, 55f3 F.2d 886 (5th.

Cir.1977). Far from not "warrant[ing] further discussion," as the Eleventh Circuit determined, this issue should have resulted in a new trial for Vallone.

CONCLUSION

For the reasons foregoing, this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,



Anthony Vallone
Reg. No 08881-054
USP Atlanta
Box PMB
Atlanta, GA 30315

VERIFICATION

I, the above-signed Petitioner, do hereby swear under penalty of perjury that the contents of the foregoing Petition are true and correct to the best of my knowledge and belief.

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

ANTHONY VALLONE, a.k.a. "Tutti,"
Petitioner, pro se,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS

[Image of small paper containing "To:" and "From:" telephone numbers for facsimile transmission]	E ELEVENTH CIRC	[Image of Clerk, Thomas K. Kahn's stamp: Oct 06,1999
	No. 96-5256	
	cket No. 93-6141-CR-JAG	

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY VALLONE, a.k.a. "Tutti,"

Defendant –Appellant.

Appeal from the United States District Court
For the Southern District of Florida

(October 6, 1999)

Before TJOFLAT, BARKETT, and MARKUS, Circuit Judges.

BARKETT, Circuit Judge:

Appellant Anthony Vallone appeals his conviction for one count of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S. C. § 841(a)(1), one count of attempt to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, one count of attempted murder in violation of 18 U.S.C. § 1512(a)(1)(A), and one count of assault with intent to commit murder in violation of 18 U.S.C. § 113(a). He argues that his conviction should be reversed for six reasons: (1) persistent prosecutorial misconduct violated his rights to due process, a fair trial, and an impartial jury; (2) he was denied the right to proceed pro se and his appointed counsel was constitutionally ineffective; (3) the district court improperly admitted hearsay evidence; (4) the district court failed to make a proper inquiry into his mental conditions; (5) the district court denied Vallone prior statements and documents of Thomas Marino, the government's key witness; (6) he was denied his constitutional right to a speedy trial. Vallone's only

claim which warrants discussion is that the prosecutor's introduction of irrelevant and unduly prejudicial evidence at trial violated his due process rights. We refuse to consider Vallone's ineffectiveness of counsel claim because that claim cannot be raised on direct appeal, where, as here, the record has not been adequately developed. See United States v. Perez-Tosta, 36 F.3d 1552, 1563 (llth Cir.1994). We reject Vallone's other contentions as meritless and affirm the district court's rulings without comment. See 11th Cir.R. 36.1.

BACKGROUND

This case arises out of a government sting operation designed to catch organized crime figures dealing in drugs. It began when Federal agents became aware that Thomas Marino, an organized crime figure and drug dealer, was willing to assist the government in identifying and arresting members of the Luchese crime family in an effort to strike a deal to help his brother, who

had been sentenced to two life imprisonment terms. At the government's direction, Marino was to help bring down members of the Luchese crime family by arranging to sell them large amounts of cocaine – part of a shipment of 1550 kilograms of cocaine that Marino had supposedly transported from Columbia, but was actually in the possession of the government. Marino, at the government's behest, pretended to be working under the direction of Frank Suppa, the head of the Luchese crime family in South Florida, and with Suppa's associates, Thomas Stabile and Frank Scarpatti, as well as Robert Reino, a member of the Luchese crime family from New Jersey. During this time, Marino met Anthony Vallone, who was introduced to him in a phone conversation with Fortunato Inzone, a Luchese associate from New Jersey and learned that Vallone might be interested in buying drugs from Marino. As a result of Marion's activities, the government ultimately brought drug trafficking charges against Suppa, Stabile, Reino, Scarpati, Vallone, and

Alan Clancy, who worked with Vallone. Vallone's trial was severed from that of his co-defendants and only Vallone's appeal is before us.

The evidence supporting Vallone's conviction for conspiracy to possess with intent to distribute and for attempt to possess cocaine with intent to distribute is fairly straightforward and is derived from the testimony of Marino and tape-recorded conversations between Marino and Vallone. That evidence reflects that Marino had received a telephone call from Inzone telling him that Vallone was coming to Florida, had money available for a deal, and "wants to do something." Vallone subsequently contacted Marino and met many times to discuss his purchase of cocaine over the next three and one-half months. During this time, Marino was recording their meetings without Vallone's knowledge. In these conversations, Marino and Vallone discussed the possible purchase prices for the cocaine and, on many occasions, Vallone told Marino that he had several potential buyers

of the cocaine. During these conversations, Marino told Vallone about the members of the Luchese crime family who were obtaining cocaine from Marino. The evidence, however, does not reflect that Vallone discussed his purchase of cocaine with any of these persons. In preparation for the drug deal, Vallone, who did not drive a car, brought Alan Clancy down to South Florida to drive for him.

On July 21, 1993, Vallone ad Marino made final preparations for the drug transaction, which was to occur the next day. Alan Clancy was also present during this meeting, but did not, for the most part, participate in the conversation. During a lengthy conversation, Marino expressed his displeasure at Vallone because Vallone had not obtained any money from his customers to purchase cocaine as Marino had instructed him to do. Marino, however, stated that he was nevertheless will to sell Vallone cocaine and they discussed different amounts that Vallone might purchase. Vallone asked Marino to

talk with Frank Suppa to see if Suppa would "front" Vallone eleven kilos of cocaine. The evidence, however, showed that Suppa would neither "front" nor loan Vallone any money. In a conversation later that evening, Marino agreed to sell Vallone thirty kilograms of cocaine.

Vallone and Marino arranged to meet the next morning to travel together to Marino's warehouse to pick up the cocaine. The next morning, however, Vallone declined to go to the warehouse and instructed Marino to put the drugs in the trunk of his car and return the car to him. Vallones' car was loaded with fake cocaine from Marino's warehouse. A government agent then drove and left Vallone's car at a shopping center parking lot. After Vallone and Alan Clancy drove off, they were stopped by government agents and arrested. At trial, Vallone admitted the conversations with Marino, but maintained that he was lying about his interest in obtaining drugs and potential drug buyers during their many discussions. Instead, Vallone stated that he only

wanted to borrow money from Marino and was "leading him on" to soften him up for a loan request. He also claims that he thought Marino agreed to loan him the money and was loading his car with $30,000 dollars in cash, not thirty kilos of cocaine.

The evidence supporting Vallone's conviction on the attempted murder and assault with intent to murder charges was that on May 13, 1994, after Vallone's arrest, Vallone stabbed Robert Reino, one of the Luchese family members arrested as a result of Marino's activities, at the prison where they were both being held. Just one week earlier, Vallone had filed a motion seeking the production of any cooperation agreement between Reino and the government. He also told his wife, Brenda Vallone, that he wanted to find out which witnesses would be testifying against him so he would know who "to tamper with."[1] Prior to the stabbing Vallone had conversations with his

---

[1] The post arrest conversations between Vallone and his wife were tape-recorded.

wife concerning his suspicions that Reino was going to plead guilty and would be testifying against him. On May 13th, Reino entered the prison unit where Vallone was housed; he was carrying blankets and a pillow in his hand. Pablo Carabeo, a physician's assistant, saw Vallone crouching over Reino and stabbing him with two ten-inch long metal shanks, one in each hand. Reino was lying on the floor bleeding from the wounds. Shortly after the incident, Vallone admitted to Lt. Wagner that he had attacked Reino, but claimed that he did it in self-defense. Vallone's testimony at trial, however, was that he stabbed Reino three times in the chest after Reino dropped on of the shanks. Reino was taken to the hospital for emergency treatment. Although he had very severe wounds, he did not die. There was no evidence that Vallone had any wounds except for a small nick on his hand. The following day, Vallone told his wife that he gave Reino "just a few holes for a reminder," commenting how "easy" it was to stab Reino.

After his conviction on the above charges, Vallone was sentenced to life imprisonment without release as to the drug counts and 240 months' imprisonment as to the murder counts, all of which to run concurrently. This appeal followed.

DISCUSSION

The essence of Vallone's due process claim is that the district court erred in admitting and the prosecutor engaged in misconduct in submitting and repeatedly eliciting, on a massive scale, irrelevant and highly prejudicial comments and testimony concerning the Luchese crime family and other crimes and crime figures. This extraneous prejudicial material involved evidence concerning the mafia as a whole, the Luchese crime family, it structure and hierarchy, its criminal activities, Brenda Vallone's mob connection and prior five-year

prison term, and Vallone's past as a heroin dealer.[2]

To reverse a conviction based on prosecutorial misconduct, the prosecutor's remarks or action must have been improper and they must prejudicially affect the substantial rights of the defendant. United States v. Wilson, 149 F.3d 1298, 1300-01 (11th Cir.1998); United States v. Gonzalez, 122 F.3d 1383, 1398 (11th Cir. 1997). "A defendant's substantial rights are prejudicially

---

[2] Vallone adequately preserved his objections to the introduction of this evidence. Vallone made continuing objections to the prosecutor's questions concerning the mafia, the Luchese crime family, its criminal activities, and Vallone's history as a heroin dealer. Vallone also objected to testimony concerning his wife's prior incarceration. We have recognized that, because frequent objections may only emphasize the prejudicial information in the jury's mind, a defendant's prosecutorial misconduct claim will be adequately preserved so long as the defendant has objected to many of the instances of misconduct. Wilson, 149 F.3d at 1301 n.5. By virtue of his continuing objections and other objections made at trial, Vallone has adequately preserved the issue for review.

affected when a reasonable probability arises that, but for the remarks, the outcome [of the trial] would be different," United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995). We make this determination, considering the entire trial and any curative instructions. Wilson, 149 F.3d at 1301. Accordingly, we must first decide whether the prosecutor's action in this case amounted to misconduct and if so, we must then consider whether Vallone has shown that he was prejudiced by that misconduct.

It is well settled that the prosecution is permitted to strike hard blows, but not foul ones. See Berger v. United State, 295 U.S. 78, 88 (1935); Wilson, 149 F.3d at 1303. A federal prosecutor is the representative of a "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and who interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice shall be done." Berger, 295 U.S. at 88. Accordingly, "a prosecutor must refrain

from improper methods calculated to produce a wrongful conviction." United States v. Blakey, 14 F.3d 1557, 1560 (11th Cir.1994) (quoting United States v. Rodriguez, 765 F.2d 1546, 1559 (11th Cir.1985)). We have recognized that a prosecutor strikes an unfair and "foul blow" when he or she introduces irrelevant or unduly prejudicial character evidence, encouraging the jury to convict the defendant based on his or her bad character. See United States v. Crutchfield, 26 F.3d 1093, 1100-03 (11th Cir.1994) (finding prosecution's attempt to introduce testimony which was "clearly irrelevant, improper and prejudicial" and to attack the "character of the defendants and their witnesses" improper); Blakey, 14 F.3d at 1560 ("[T]he government may not rely on the defendant's bad character to win a conviction unless the defendant puts character in issue.").

The same is true where the prosecutor elicits irrelevant and unduly prejudicial background information designed to show the defendant's "bad" associations.

Rule 402 makes it improper for a prosecutor to elicit any type of irrelevant evidence. Even where background evidence has some relevance, a prosecutor may nevertheless act improperly in seeking to admit such evidence. Rule 403 forbids the admission of any "matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect," United States v. McRae, 593 F.2d 700, 707 (5th Cir.1979), and a prosecutor acts improperly in eliciting such testimony. See United State v. Mills, 704 F.2d 1553, 1560 (11th Cir. 1983) (noting that if testimony regarding witnesses' "deathly fear" of "Aryan Brotherhood" organization "had been introduced merely to bolster the prosecution's case-in-chief we might will find a Rule 403 violation sufficient to constitute reversible error").

The prosecutor's conduct in this case violated these principles. From the very beginning of jury selection until the verdict in this case, the government focused the jury's attention on the mafia and extraneous

events involving organized crime figures, many of who had no connection to Vallone. At Vallone's trial, the government elicited testimony concerning the mafia in general, describing the different crime families, the typical structure of a crime family, including the requirements for becoming a "made" member, and the way criminal activities are conducted and the profits divided by a mafia "crew." The government also elicited substantial testimony concerning the Luchese crime family, in particular, detailing the Luchese family's members in South Florida and New Jersey, the family's hierarchy and structure, as well as its extensive criminal activities in both South Florida and New Jersey dating back to the 1970s. In the same vein, the government elicited many references to serious crimes committed by other organized crime figures – all totally unrelated to the case against Vallone. Indeed, we would have to reproduce a significant portion of the transcript to

delineate all the irrelevant and unduly prejudicial prosecutorial comments and evidence elcited in this case.

These comments and evidence had no bearing on whether Vallone was guilty of the crimes charged in the indictment. There was no evidence that Vallone had any involvement in any of these earlier criminal activities or was even working with any member of the Luchese family or other organized crime figures at the time of these activities or in the recent past. Indeed, Vallone's connection to the Luchese crime family at all was extremely attenuated. Although there was evidence that both Suppa and Inzone knew Vallone based on his past as a heroin dealer, the evidence does not show that Vallone was a part of the Luchese family. Moreover, there was no evidence that Vallone ever spoke with either Suppa, Inzone, Stabile, Reino, or Scarpati concerning cocaine dealing. Vallone's discussions concerning the cocaine distribution conspiracy charged in the indictment were exclusively with Marino. In fact, Suppa did not want

Vallone to be involved in Marino's activities, telling Marino that Vallone was a "looney" who has "got nothing going for him" and that "I never liked him." Despite Suppa's initial instructions to exclude Vallone, Marino agreed to sell him cocaine and Suppa did not object when notified by Marino so long as Vallone could pay for the cocaine.

Given Vallone's lack of a connection to the Luchese family and the magnitude of the mafia-related background information, the effect of the testimony concerning the mafia and the Luchese family was unquestionably unfairly prejudicial, casting a mafia pall over the proceedings. See United States v. Pepe, 747 F.2d 632, 671 (11th Cir.1984) ("We realize that testimony concerning 'the mafia' and 'la cosa nostra' can be most inflammatory, especially when a defendant has an Italian surname."). That some of Vallone's former associates were extensively involved in criminal activities committed by mafia is irrelevant to proving that Vallone

committed the criminal acts charged in the indictment. See United States v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. Unit A June 1981) (noting the "long established rule that a defendant's guilt may not be proven by showing he associates with unsavory characters").[3] Introducing this evidence subjected Vallone to unfairly prejudicial evidence.[4]

---

[3] Decision of the former Fifth Circuit decided prior to September 30, 1981 are binding on this court. Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir.1981) (en banc).

[4] This case is distinguished from Pepe where we upheld the admission of testimony concerning on of the defendat's participation in criminal activities as a member of the Genovese crime family. See Pepe, 747 F.2d at 669-71. In upholding the admission of this testimony, we noted that the testimony was highly probative - it involved similar prior acts committed by the defendant - and that the government elicited the testimony so as to avoid unfairly prejudicing the defendant. Indeed, "[a]t no time during [the] direct examination did the prosecutor, or [the witness], use the terms 'mafia,' 'mob,' or 'la cosa nostra,'" Id, at 669. We face a far different situation here.

The government contends that this evidence was "necessary because it formed an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." United States v. Costa, 691 F.2d 1358, 1361 (11th Cir.1982); see also United States v. Richardson, 764 F.2d 1514, 1521-22 (11th Cir.1985). We do not see how. This crime involved Vallone, Clancy, Marino, and to a very attenuated extent, Inzone, for a purchase of cocaine – separate from Marino's sale of cocaine to members of the Luchese family. Although some of the prosecutor's questions were undoubtedly proper for background, the government's repeated attempts to put irrelevant and unduly prejudicial testimony on a large scale before the jury cannot be justified on this basis. The

---

The government introduced extensive evidence of the criminal activities of the Luchese crime family - acts in which Vallone took no part. Further, unlike in Pepe, no efforts were made to limit the highly prejudicial testimony to prevent unfairness to the defendant.

cumulative effect of the prosecutor's questioning was to subject Vallone to highly and unfairly prejudicial evidence. See Blakey, 14 F.3d at 1561 ("Standing alone, none of the comments in this case would warrant reversal, but taken together, their cumulative effect presents a different problem.").

Certainly, under our cases, the government was entitled to introduce the evidence necessary for the jury to understand the tape-recorded discussions between Marino and Vallone and between Marino and other members of the Luchese family and explain how Vallone was connected to Marino. See United States v. McLean, 139 F.3d 1398, 1404 (11th Cir.1998) (upholding admission of evidence concerning drug organization to explain "why McLean was the target of the government's investigation" and to explain "the use of nicknames by members of the organization, such knowledge being necessary for the understanding of other pieces of evidence"). The government, however, went well beyond

what was necessary to give the jury sufficient background information to understand the full context of the crimes charges in the indictment and the tape-recorded evidence. We fail to see how the evidence concerning the mafia and Luchese family and its involvement in a wide variety of criminal activities, many of which did not involve drug distribution and all of which did not involve Vallone and were not otherwise related to this case, was necessary to provide the jury with the full context of the crimes alleged in the indictment or was otherwise inextricably intertwined with the government's proof of Vallone's guilt. We decline to permit prosecutors to use the rule permitting "complete story" evidence as a catchall for admitting all sorts of prior bad acts or prejudicial background information which may be distantly related or totally unrelated to the crimes charges. See United States v. Veltmann, 6 F.3d 1483, 1498 (11th Cir.1993) (refusing to permit prosecution in murder by fire case to admit evidence of prior fire occurring in the 1970s where

"evidence of previous fires [was not] necessary to complete the story of this crime" and "[t]here is nothing linking the previous and present fires"); United States v. Krezdorn, 639 F.2d 1327, 1331-32 (5th Cir.Unit A Mar. 1981) (refusing to permit prosecution to introduce evidence of thirty-two additional forgeries because they "are not necessary to explain the circumstances surrounding the forgery . . . for which Krezdorn was charged" and "do[] not constitute part of the 'system of criminal action'"").

Concerning his pattern of impugning Vallone based on his associations, the prosecutor also committed misconduct by eliciting testimony that Brenda Vallone was a "mob buff" and detailing her mob connections and prior incarceration. As we noted in Singleterry, "admission of evidence of bad conduct of relatives or friends is error." Singleterry, 646 F.2d at 1018. "That one is married to, associated with, or in the company of a criminal does not support the inference that that person is

a criminal or shares the criminal's guilty knowledge." United States v. Forrest, 620 F.2d 446, 450 (5th Cir.1980) (footnotes omitted); see also United States v. Ochoa, 609 F.2d 198, 205 (5th Cir.1980). That Brenda Vallone associated with members of the mafia and served a prior prison term was irrelevant to the jury's determination of Anthony Vallone's guilty of the charges in the indictment. The government has failed to explain what possible relevance her mob ties and prior conviction had to Vallone's guilt on the charges in this case. Nor has it explained why testimony concerning her connections to the mob was necessary to provide a jury with a complete understanding of the facts of the case or how this evidence was inextricably intertwined with the government's other evidence. At best, Marino's testimony concerning her mafia ties suggests that her husband, Anthony Vallone, was affiliated with the mob, but that is the precise inference prohibited by our cases.

The government suggests that Marino's testimony concerning Brenda Vallone helps to prove the conspiracy because Alan Clancy was at the Vallone's house when she showed Marino photographs of various mobsters she knew. However the evidence of Clancy's participation in the conspiracy was clear. Clancy not only drove the car loaded with fake cocaine, but he was present for a lengthy taped conversation in which Vallone and Marino discussed the cocaine transaction. There was really no disputed issue in this case that Clancy was a participant. Rule 403's "major function of 'excluding matter of scant or cumulative force, dragged in by the heels for the sake of its prejudicial effect' is required here." United States v. Utter, 97 F.3d 509, 514-15 (11th Cir.1997) (quoting McRae, 593 F.2d at 707).

Finally, the prosecutor committed misconduct by repeatedly eliciting testimony concerning Vallone's prior history as a heroin dealer. Had the government only once sought to introduce evidence that Marino began working

with Vallone based on Vallone's prior history of heroin dealing to explain to the jury the full context of the crimes charged here, its actions would have been proper. See Richardson, 764 F.2d at 1521-22; Costa, 691 F.2d at 1361. But, time and again, the prosecutor elicited testimony from Thomas Marino that Vallone had been involved in selling heroin. The government has offered no justification for its repeated attempts to put this prejudicial information before the jury and we can discern none from the record.[5]

However, notwithstanding the extent of the prosecutorial misconduct, Vallone's conviction must still be affirmed. Coexistent with the irrelevant and unduly

---

[5] Even assuming that evidence of Vallone's prior drug dealing was relevant to show his intent to participate in the conspiracy issue here – an argument the government does not make – his intent was overwhelmingly established by the tape-recorded evidence. Proving intent using his past as a heroin dealer was wholly unwarranted an improper.

prejudicial evidence detailed above, there was also overwhelming evidence of guilty that was properly admitted at trial. As noted above, the jury heard Vallone and Marino negotiate a deal to purchase cocaine for over three months. It also heard eye-witness testimony that Vallone stabbed Reino, inflicting severe wounds. Although Vallone maintained that the stabbing was done in self-defense, Vallone's own testimony was that he repeatedly stabbed Reino at a time when Reino posed no threat to Vallone. The jury also heard Vallone's direct telephone conversation with his wife, suggesting clearly that the stabbing was not in self-defense.

Although we are hesitant to affirm a conviction where there has been such substantial prosecutorial misconduct, we must do so here. We cannot say that it is reasonably probable that the outcome of the trial would have been different had the government refrained from introducing the prejudicial evidence concerning the mafia, the Luchese crime family, its extensive criminal

activities, Brenda Vallone's mafia ties and prior conviction, and Vallone's prior drug dealings. Thus, Vallone cannot prove the prejudice necessary to reverse his conviction. See Wilson, 149 F.3d at 1302; McLean, 138 F.3d at 1405.

Although we must affirm Vallone's conviction, we repeat and reemphasize what we said concerning prosecutorial misconduct in Wilson. District court judges must be vigilant to prevent prosecutors from acting improperly in the cases that come before them. District courts have the authority to sanction prosecutors for misconduct to ensure that prosecutors not only follow their duty to zealously prosecute law-breakers, but also honor their obligation to do so using fair, not foul, means. Wilson, 149 F.3d at 1303-04.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIR[illegible]

[Image of Clerk, Thomas K. Kahn's stamp: Jan 03,2000]

No. 96-5256

UNITED STATES OF AMERICA,
Plantiff-Appellee,

versus

ANTHONY VALLONE, a.k.a.
"Tutti",
Defendant-Appellant.

- -

On Appeal from the United States District Court for the Southern District of Florida

- -

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: TJOFLAT, BARKETT and MARKUS, Ciruit Judges.

PER CURIAM:

APPENDIX B

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Rosemary Barkett /s/

UNITED STATES CIRCUIT JUDGE

ORD-42
6/95

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter **Area Code 202**
Clerk of the Court **479-3011**

March 13, 2000

Mr. Anthony Vallone
#08881-054
Box PMB
Atlanta, GA 30315

Re: Anthony Vallone
v. United States
Application No. 99A738

Dear Mr. Vallone,

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on March 13, 2000, extended the time to and including May 12, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER,
Clerk

APPENDIX C

By
Jeffrey D. Atkins /s/
Jeffrey D. Atkins
Assistant Clerk